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No. 295

In the Supreme Court of the United States

OCTOBER TERM, 1957

ASSOCIATION OF LITHUANIAN WORKERS AND AMERICAN LITHUANIAN WORKERS LITERARY ASSOCIATION, INC., PETITIONERS

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes, executive orders and regulations involved	2
Statement	3
1. The statutes, orders and rules of procedure	4
2. The administrative actions in this case	8
a. The Workers Association case	8
b. The Literary Association case	11
3. The proceedings below	12
Argument	15
Conclusion	22
Appendix	23

CITATIONS

Cases:

Adler v. *Board of Education*, 342 U. S. 485	21, 22
Aircraft & Diesel Corp. v. *Hirsch*, 331 U. S. 752	16
Allen v. *Grand Central Aircraft Co.*, 347 U. S. 535	16
Bourjois, Inc. v. *Chapman*, 301 U. S. 183	16
Cole v. *Young*, 351 U. S. 536	5
Fahey v. *Mallonee*, 332 U. S. 245	16
Falbo v. *United States*, 320 U. S. 549	16
Franklin v. *Jonco Aircraft Co.*, 346 U. S. 868	16
Goldsmith v. *Board of Tax Appeals*, 270 U. S. 117	16
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322	19–20
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123	4, 21
Myers v. *Bethlehem Corp.*, 303 U. S. 41	16
National Council of American-Soviet Friendship v. *Brownell*, 243 F. 2d 222	16
National Lawyers Guild v. *Brownell*, 225 F. 2d 552, certiorari denied, 351 U. S. 927	14, 17, 18, 21–22
Olinger v. *Partridge*, 196 F. 2d 986	16
Wieman v. *Updegraff*, 344 U. S. 183	21, 22
Yakus v. *United States*, 321 U. S. 414	16

436626—57——1

Constitution and Statutes: Page

Constitution of the United States:

First Amendment 13

Fifth Amendment 13

Ninth Amendment 13

Tenth Amendment 13

Act of August 9, 1955, 69 Stat. 624–625:

Section 1 (5 U. S. C. 118 p (Supp. III)) 4, 23

Section 4 (2) (5 U. S. C. 118j (Supp. III)) 4, 23

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq* 13

Hatch Act, Sec. 9A, 53 Stat. 1148, 5 U. S. C. 118j. 2, 4, 23

Public Law 733, 81st Congress (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1, *et seq.*) 2, 4, 5, 23

Miscellaneous:

Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 CFR, 1956 Supp., Part 41 ..... 2, 6, 27

Section 41.1 28

Section 41.1 (a) 28

Section 41.1 (b) 6, 28

Section 41.1 (c) 29

Section 41.2 ..... 6, 29

Section 41.3 ..... 3, 7, 17, 18, 19, 29

Section 41.4 ..... 3, 7, 30

Section 41.5 ..... 7, 30

Section 41.6 30

Section 41.7 ..... 7, 30

Section 41.8 31

Section 41.8 (a) 31

Section 41.8 (b) 8, 31

Section 41.8 (c) 7, 31

Section 41.8 (d) 7, 31

Section 41.8 (e) 31

Section 41.8 (f) 7, 31

Section 41.8 (g) 31

Section 41.8 (h) 7, 31

Section 41.8 (i) 8, 32

Section 41.8 (j) 7, 32

Section 41.8 (k) 32

Section 41.9 ..... 7, 32

Section 41.10 ..... 8, 32

Section 41.11 33

Miscellaneous—Continued Page

Executive Order 9835 of March 21, 1947, 12 F. R. 1935 ..... 2, 4, 6, 13, 21

Part III:

Paragraph 3 ..... 5, 24

Paragraph 3 (a) 25

Executive Order 10450, effective May 27, 1953, 18 F. R. 2489 ..... 2, 4, 5, 12, 13, 21, 25

Section 2 ..... 5, 25

Section 5 5

Section 6 ..... 5, 26

Section 8 5

Section 8 (a) 5, 26

Section 12 ..... 6, 27

Section 13 ..... 6, 27

Section 15 27

18 F. R. 2741 6

19 F. R. 655 12

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OPINIONS BELOW

No opinion was filed by the District Court. The opinion of the Court of Appeals and the dissenting opinion of Judge Prettyman (W. R. 46–56; L. R. 34–44; Pet. 7a–16a [1]) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1957 (W. R. 57; L. R. 45; Pet. 17a). The

[1] As in the petition, petitioners are hereafter referred to as the Workers Association and the Literary Association and record references are designated by "W. R. —" and "L. R. —," respectively. References to the petition are designated "Pet. —".

petition for a writ of certiorari was filed on July 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether petitioners' failure to exhaust the proffered administrative remedies precluded judicial review of the grounds for, and the propriety of, their designation as organizations falling within the purview of Executive Orders 9835 and 10450.

2. Whether either of the petitioners filed a timely reply to the respective statements by the Attorney General of the grounds for proposed designations of the organization, and the written interrogatories sent to the organization.

3. Whether the Court of Appeals correctly ruled that, assuming the question of constitutional power to be properly before the court, Executive Order 10450 validly authorizes the Attorney General, after appropriate proceedings, to designate organizations as being within the purview of Executive Orders 9835 and 10450.

STATUTES, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The pertinent provisions of Section 9A of the Hatch Act (53 Stat. 1148, formerly 5 U. S. C. 118j); of Public Law 733, 81st Congress (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1 *et seq.*); of Executive Order 9835 (12 F. R. 1935); of Executive Order 10450 (18 F. R. 2489); and the provisions of the Attorney General's Rules of Procedure for the federal employee security program (Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 CFR, 1956 Supp., Part 41),

are set forth in the Appendix, *infra*, pp. 23–33. Sections 41.3 and 41.4 of these Rules provide as follows:

> SECTION 41.3. *Reply by organization.*—The organization, within sixty days following receipt of such statement and interrogatories, may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.
>
> SECTION 41.4 *Request for hearing.*—Any organization filing a reply as provided in this part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

STATEMENT

Petitioners, the Association of Lithuanian Workers and the American Lithuanian Workers Literary Association, Inc., seek to enjoin the Attorney General from

continuing his designations of them as organizations within the purview of Executive Orders 9835 and 10450. The pertinent facts may be summarized as follows:

1. *The Statutes, Orders and Rules of Procedure.*—Section 9A of the Hatch Act, passed by Congress in 1939, made it unlawful for any employee of the Federal Government "* * * to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States".[1] Pursuant to this and other authority, the President in 1947 issued Executive Order 9835, 12 F. R. 1935 (App. *infra*, pp. 24–25), establishing the President's Federal Employees Loyalty Program (see *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123). Thereafter, by the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1, *et seq.*; App. *infra*, pp. 23–24), Congress provided for the summary suspension of federal employes in the interest of national security.

On April 27, 1953, the President issued Executive Order 10450, 18 F. R. 2489 (App. *infra*, pp. 25–27), invoking the authority vested in him "by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j) [the Hatch Act]; and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, *et seq.*) [the summary suspension

[1] This section was repealed and its provisions, as pertinent here, were essentially reenacted as Section 118p of Title 5 of the United States Code (Supp. III), by the Act of August 9, 1955, Sections 1 and 4 (2), 69 Stat. 624–625.

statute]" (see *Cole* v. *Young*, 351 U. S. 536). The Executive Order revoked and superseded Executive Order 9835 and established new standards and procedures, based on considerations of security rather than loyalty, governing the employment and retention in employment of persons in the federal service. In conformity with the Act of August 26, 1950, cited in the Preamble of the Order, Executive Order 10450 prescribes the standard that employment and retention in employment of all government officers and employees to whom the Order pertains be "clearly consistent with the interests of the national security" (Sections 2, 5, 6, 8, App. *infra*, pp. 25–27).

As in the earlier Loyalty Program, one of the factors to be considered in reaching determinations under the Security Program is "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, * * *" (Section 8 (a) (5), App. *infra*, pp. 26–27). In this connection, the Department of Justice is directed to continue to furnish the information described in Part III, Paragraph 3, of Executive Order 9835 (App. *infra*, pp. 24–25)[3] directly to the heads

[3] "* * * the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

of executive departments and agencies (Sections 12, 13, App. *infra*, p. 27). Pursuant to this directive, the Attorney General, on April 29, 1953, 18 F. R. 2741, redesignated the organizations previously designated under Executive Order 9835. Concurrently, the Attorney General prescribed Rules of Procedure with respect to notice, hearing, and designation of organizations, 18 F. R. 2619 (App. *infra*, pp. 27–33).

The Rules permit an organization, which the Attorney General after appropriate investigation proposes to designate, to file with the Attorney General, within ten days following receipt of notice by registered mail of the proposed action, a statement that it contests the proposed designation. Section 41.1 (b) (App. *infra*, pp. 28–29). Failure to contest the proposed action may result, after an appropriate determination, in the designation of the organization (*ibid.*).

The Rules prescribe that, within sixty days after a proposed designation is contested, the Attorney General shall furnish the organization in question with a statement of the grounds upon which the contemplated action is based, and written interrogatories with respect thereto. Section 41.2 (App. *infra*, p. 29). The organization is then given sixty days within which to reply. The reply must be verified and signed by the executive officers of the organization, and "shall answer each interrogatory completely and with particularity and shall be limited to statements of fact". Supporting affidavits may be submitted with the reply. Failure to answer any interrogatory shall be deemed an admission of the truth of the facts to which the

interrogatory refers; the submission of an evasive reply to an interrogatory shall be deemed a similar admission; and "[f]ailure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation". Section 41.3 (App. *infra*, pp. 29–30).

Any organization filing a reply as provided in the regulations may at the same time file a written request for a hearing. Section 41.4 (App. *infra*, p. 30). Upon receipt of such a request, the Attorney General is required to set a date and fix a place for the hearing, and to notify the organization by registered mail. Section 41.5 (App. *infra*, p. 30).

The hearing required by the Rules is to be conducted informally, and in an orderly and impartial manner, before a board or officer selected by the Attorney General. Section 41.7, 41.8 (c) (App. *infra*, pp. 30–32). During the proceedings an organization is entitled:—to be represented by counsel of its own choice (Section 41.8 (d), App. *infra*, p. 31); to introduce relevant and material evidence (Section 41.8 (f), App. *infra*, p. 31); to file objections to, and be heard on, the admission or exclusion of evidence (Section 41.8 (h), App. *infra*, pp. 31–32); to cross-examine witnesses insofar as consistent with the interests of national security (Section 41.8 (j), App. *infra*, p. 32); and to inspect or be furnished with, on payment of costs, a transcript of the proceedings (Section 41.9, App. *infra*, p. 32). Relevant or material evidence, in summary form where full disclosure would be inimical to the security of the nation, may also be introduced on behalf of the

Attorney General (Section 41.8 (b) and (i), App. *infra*, pp. 31–32).

Within a reasonable time following completion of the hearing, the Attorney General is required to make his final determination on the basis of the entire record, and to notify the organization in question by registered mail. Section 41.10 (App. *infra*, pp. 32–33). Any handicap imposed upon an organization by virtue of the non-disclosure of classified security information or the identity of confidential informants is to be taken into consideration by the Attorney General in making his final determination (*ibid.*).

2. *The administrative actions in this case*—(a) *The Workers Association case.*—On April 29, 1953, the Attorney General served notice upon the Workers Association by registered letter that he proposed to designate it "as coming within the purview of Executive Orders No. 9835 and No. 10450 in accordance with the rules promulgated thereunder * * * ". A copy of the Rules was attached to the notice (W. R. 21). The Worker Association filed a notice of contest on May 8, 1953 (W. R. 22), and on July 8, 1953, the Attorney General served a statement of grounds and interrogatories upon the Association (W. R. 23–38).

The grounds stated for the proposed designation were, in brief, that the Workers Association was formed by and operated under the leadership of Communist Party members; that from its formation it had constituted a vehicle to further the aims, policies and objectives of the Communist Party, distributing Communist propaganda and raising funds for the Communist Party; that it had engaged Communist

Party members to speak at functions; that it had published and circulated three named newspapers which consistently supported and implemented Communist Party policies; and that the Association "has never knowingly deviated in its program and objectives from the program and objectives of the Communist Party-U. S. A." (W. R. 23–26). The twenty-three interrogatories requested information concerning the Association, its operations, and the Communist activities or affiliations of the Association, of its lodges or branches, and of its officers and members (W. R. 26–38).

On September 8, 1953, the Association wrote a letter to the Attorney General acknowledging receipt of the statement of grounds and the interrogatories (W. R. 39–41). The letter stated that the activities of the Association were confined to the operation of a fraternal insurance beneficial society and that it was not carrying out the policies of the Communist Party. The Association objected that the Attorney General's rules and requirements made it "impossible for the Association to have a hearing"; that, "[f]or example", respondent would require the Association's officers to furnish the names, addresses, and political beliefs, affiliations and sympathetic associations of all its members, an impossible requirement since the Association had no such records; and that the rules conditioned entitlement to a hearing upon compliance "with this and other unconstitutional and impossible requirements" (W. R. 40–41). After further general objections to the procedures provided and specific objections to those provisions of the regulations permitting the use

of information undisclosed to the organization, the letter closed with the following statement (W. R. 41):

> In view of the foregoing, we respectfully request that you discontinue this proceeding against the Association. Should you persist in your avowed purpose to list it, the Association will have no alternative except to seek justice in the courts.

The letter was not verified nor was it accompanied by a written request for a hearing.

On October 4, 1953, Harold I. Cammer, Esq., wrote to the Attorney General, informing him that he had been retained as counsel for the Workers Association, objecting to and requesting the withdrawal of all the interrogatories except the first three, on the ground that they were impossible to answer or asked information which it was improper for the Attorney General to attempt to elicit, and advising that the Association desired a hearing (W. R. 42–43).

The Assistant Attorney General in charge of the Criminal Division of the Department of Justice replied to Mr. Cammer's letter on November 25, 1953 (W. R. 43–44). He noted that "[o]n September 8, 1953, the Association advised the Department that it rejected the hearing provided for under the rules * * *". He further noted that Mr. Cammer's subsequent letter was not filed within the 60-day period provided for in the Rules, nor was the request for a hearing contained therein signed by the executive officers of the Association, and it was therefore neither timely nor in proper form (W. R. 44).

(b) *The Literary Association case.*—The Attorney General served the Literary Association with a notice of his proposal to designate it and a copy of his Rules on April 29, 1953 (L. R. 14). Notice of contest was dated May 21, 1953 (L. R. 15), and on July 24, 1953, the Attorney General served his statement of grounds and interrogatories (L. R. 16–29). The grounds stated for the proposed designation (L. R. 16–18) were essentially the same as those set forth in the Workers Association case (*supra,* pp. 8–9), and the thirty-eight interrogatories (L. R. 18–29) requested information similar to that sought to be elicited from the Workers Association (*supra,* p. 9).

On September 24, 1953, the Attorney General received a sworn statement, signed by the President and Secretary of the Literary Association, purportedly replying to the statement of grounds and the interrogatories (L. R. 11, 30–32). The statement contained no responses to the interrogatories, nor any specific objections thereto. It asserted instead that the Literary Association had abided by the terms of its certificate of incorporation and adhered to its purposes of carrying on literary activities; that it had never inquired into the politics or religion of its members; that its activities did not come within the provisions of Executive Order 10450; that the Federal Constitution precluded the Attorney General from inquiring into the writings and publishings of the Literary Association; that under the Constitution respondent had no authority to make the proposed designation; and that "[t]he proceedings should be dismissed" (L. R. 30–31).

On January 22, 1954, the Attorney General signed the following order designating both the Workers Association and the Literary Association as organizations within the purview of Executive Order 10450 (19 F. R. 655):

* * * * *

> Following notice of proposed designation under Executive Order No. 10450, the organizations listed below filed notice of contest of such designation and were therefore forwarded by registered mail a statement of the grounds upon which the designation was proposed to be made, together with interrogatories with respect thereto. Section 41.3 of the rules of procedure with respect to notice, hearing and designation of organizations in connection with the Federal employee security program (18 F. R. 2619; 28 CFR 41.1 to 41.11) provides that within sixty days following receipt of such statement and interrogatories the organization shall file a verified reply, answering each interrogatory completely and with particularity. The following organizations have failed to comply in the manner required by said § 41.3 of the rules, and these organizations are therefore designated pursuant to Executive Order No. 10450:
>
> American Lithuanian Workers Literary Association (also known as Amerikos Lietuviu Darbininku Literaturos Draugija).
>
> * * * * *
>
> Association of Lithuanian Workers (also known as Lietuviu Darbininku Susivienijimas).

* * * * *

3. *The proceedings below.*—Following this concurrent designation, both the Workers Association and the Literary Association filed complaints in the Dis-

trict Court for the District of Columbia. The complaint of the Workers Association seeks a judgment enjoining respondent from continuing to designate it and requiring him to notify all federal departments and agencies that the designation is withdrawn (W. R. 11–12). The complaint of the Literary Association asks the court, in addition, to declare the regulatory procedures illegal and unconstitutional, and to require the Attorney General to notify the general public, as well as the heads of departments and agencies, of the withdrawal of the designation (L. R. 7). The complaints allege, in essence, that the Workers Association and the Literary Association conduct a fraternal insurance business and literary and publishing activities, respectively; that they are not organizations of the kind referred to in Executive Orders 9835 and 10450; that their designations were illegal and unconstitutional in that they were accomplished without a hearing in violation of the Attorney General's rules, the Administrative Procedure Act, and the due process clause of the Fifth Amendment; that Executive Orders 9835 and 10450 are unconstitutional on their face and as applied under the First, Fifth, Ninth and Tenth Amendments, as well as under the prohibition against bills of attainder; that the Attorney General's Rules of Procedure violate the Administrative Procedure Act and the due process clause of the Fifth Amendment; and that the designations violated the Executive Orders because made without appropriate investigation and determination and because contrary to fact. The Workers Association complaint adds

that, in construing its letter of September 8, 1953 as a rejection of the hearing provided by the Rules, the Attorney General acted arbitrarily (W. R. 8–9).

The Attorney General filed answers setting forth, *inter alia*, that petitioners' failure to avail themselves of the opportunity to obtain a full administrative hearing precluded them from judicial relief (W. R. 12–44; L. R. 8–32). In each case, respondent moved for judgment on the pleadings or, in the alternative, for summary judgment (W. R. 44–45; L. R. 32). Orders granting the respective motions for judgment on the pleadings were entered on August 11, 1955 (W. R. 45; L. R. 33).

On appeal, the cases were heard and decided together and the judgments affirmed (Pet. 17a). In the Workers Association case, the court (per Wilbur K. Miller, J.) ruled that the Association "did not reply to or challenge the interrogatories before the administrative body, which would have entitled it to a hearing", but instead rejected the administrative process; having failed to exhaust the proffered administrative remedy, the Association was not entitled to judicial review "of the grounds for and the propriety of the designation" (Pet. 10a). The court added that, even if the validity of the designation power and of the designation procedures were properly before it, it would uphold the constitutionality of both on the authority of its decision in *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (C. A. D. C.), certiorari denied, 351 U. S. 927 (Pet. 11a). Judge Prettyman, dissenting, took the view that the Attorney General's Rules require a complete reply to each interrogatory,

that entitlement to a hearing was therefore conditioned in this case upon the submission of answers to questions which he viewed as impossible to answer, and that the offer of a hearing was therefore a nullity. He also read the Association's letter of September 8, 1953 as a timely response to the statement of grounds and interrogatories (Pet. 12a–16a).

In the Literary Association case, Judge Miller stated for the court that the Association's "so-called reply was not a response to the Attorney General's statement of grounds and interrogatories" and that therefore the Association could not obtain judicial relief (Pet. 11a–12a). Judge Prettyman concurred on the ground that the Association had failed to object to the proffered procedure with sufficient specificity to enable the Attorney General to pass upon the challenge (Pet. 12a).

ARGUMENT

1. The Court of Appeals ruled that it need not decide the constitutional validity of either the designation procedures or the Attorney General's general power of designation, since petitioners had rejected or failed to take advantage of the opportunity to contest the proposed designations (Pet. 10a–11a). Petitioners attack this ruling on the ground that the doctrine requiring the exhaustion of administrative remedies does not apply because they have already been designated (Pet. 19, 29).

A default by a party to administrative proceedings, resulting in adverse administrative action, does not, however, operate to avoid the requirements of the

exhaustion doctrine. *Falbo* v. *United States*, 320 U. S. 549; *Yakus* v. *United States*, 321 U. S. 414, 433, 434; *National Council of American-Soviet Friendship* v. *Brownell*, 243 F. 2d 222, 225 (C. A. D. C.); *Olinger* v. *Partridge*, 196 F. 2d 986, 987 (C. A. 9). That doctrine requires resort to challenged administrative procedures before attempting to litigate to their validity. *E. g.*, *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Franklin* v. *Jonco Aircraft Co.*, 346 U. S. 868; *Fahey* v. *Mallonee*, 332 U. S. 245; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. This court has also held that the exhaustion doctrine applies to preclude judicial review even where, as here, the constitutional power to act is itself challenged. *E. g.*, *Allen* v. *Grand Central Aircraft Co.*, *supra*, *Franklin* v. *Jonco Aircraft Corp.*, *supra*; *Aircraft & Diesel Corp.* v. *Hirsch*, *supra*; *Myers* v. *Bethlehem Corp.*, *supra*. Should these requirements of the exhaustion rule be held inoperative in the case of a default, the basic rationale of the rule—that the exhaustion of an administrative remedy may obviate the need for any judicial determination or render more precise the scope of a decision required—would be destroyed. And the reasons for applying the doctrine are especially compelling where, as here, the litigant seeks to raise substantial constitutional issues. *Aircraft & Diesel Corp.* v. *Hirsch*, *supra*, 331 U. S. at 772–773.

2. Petitioners claim, however, that they were designated by default "because they failed to answer in-

terrogatories * * * and because they protested the interrogatories * * *" (Pet. 25), asserting that "an objection to the interrogatories is treated as a default" (Pet. 28). The contention is that they made such objections, but to no avail (Pet. 17–18, 24–25).

(*a*) But the fact is that petitioners were defaulted, not "because they protested the interrogatories", but because they failed to do so and instead rejected the entire administrative process. As this record demonstrates, the Attorney General would accept—for purposes of entitling an ogamization to the established administrative procedures—specific objections to interrogatories, made in good faith, as an alternative to direct answers. The Assistant Attorney General's letter of November 25, 1953 (W. R. 43–44) (*supra*, p. 10), responding to the letter of the Workers Association's belatedly-retained counsel, made it plain that, had the objections set forth by counsel (W. R. 42–43) been timely filed and appropriately signed, they would have been accepted in lieu of answers, and the Association would have been deemed to have complied with Section 41.3 of the Attorney General's Rules, so as to entitle it to a hearing.[5] The Court of

[4] Petitioners also claim (Pet. 27) that, on their face, the Attorney General's Rules are inconsistent with due process. This contention was likewise made and rejected in *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (C. A. D. C.), and was raised in the petition for certiorari in that case which was denied in 351 U. S. 927. See the Brief for the Respondent in Opposition, O. T. 1955, No. 496, at pp. 17–19.

[5] This course would have been in line with that followed by the Attorney General in the case of the National Lawyers Guild. On December 30, 1953, the Attorney General granted the Guild's request for an extension of time within which to

Appeals recognized this, stating that either a reply or a challenge to the interrogatories "would have entitled [the Workers Association] to a hearing"[6] (Pet. 10a).

(*b*) It is clear that both petitioners failed to answer the interrogatories or to enter objections in appropriate form and of sufficient specificity, so as to require that they be passed upon.

(i) *The Workers Association's response.*—The Workers Association contends that its letter of September 8, 1953—the only document filed within the sixty-day period prescribed by the Rules (Section 41.3, App. *infra*, pp. 29–30)—constituted a bona fide "reply" within the meaning of Section 41.3, and that therefore the designation by default was in violation of the Attorney General's own Rules. The letter failed, however, to meet even the minimal requirements of the Rules, a copy of which was furnished to the Association with

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answer the statement of grounds and interrogatories, as well as an extension of time within which to request modification of the interrogatories. The interrogatories were thereafter amended pursuant to the Guild's application. See Part II, pp. 31–65, of the Record in No. 496, O. T. 1955, *National Lawyers Guild* v. *Brownell*, 351 U. S. 927.

[6] Judge Prettyman's dissenting view that Section 41.3 precludes objection as an alternative to answering interrogatories (Pet. 12a–14a) is difficult to reconcile with his simultaneous ruling that the Literary Association's failure to make specific objections barred relief in its case (Pet. 12a). It is also difficult to reconcile with his earlier statement in *National Lawyers Guild* v. *Brownell*, *supra*, 225 F. 2d at 558, where he stated for a unanimous court:

"We think the proper place to test these interrogatories in the first instance is before the administrative body. * * * Some modifications have already been made, and we cannot now say that others will not be made if specific application is made."

the notice of proposed designation (W. R. 21). Thus, the letter was not verified as required by Section 41.3; this alone would have been sufficient grounds for refusing to treat it as a reply. But the text of the letter further made it plain that it was intended neither as an answer to the interrogatories nor as a statement of objections to be considered and passed upon by the Attorney General. The Association asserted its innocence, complained generally that the interrogatories were impossible to answer, and attacked the Rules and hearing procedures as unconstitutional. But it did not ask that any or all of the interrogatories be modified or withdrawn; it did not request a hearing on either the question of designation or the merits of its objections; nor did it ask the Attorney General to give any consideration whatsoever to its objections. Instead, it requested the complete discontinuation of the proceedings, threatening action in the courts in the event of a failure to comply with this request (W. R. 41; *supra*, p. 10). The Attorney General rightfully interpreted this letter as a rejection of the administrative procedures, resulting in default by the Association[7] (W. R. 44).

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[7] Compare *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, in which a corporation sued by the State of Arkansas under its anti-trust laws was subjected to a $10,000 fine by entry of a default judgment pursuant to statute after it refused to obey an order to produce witnesses and documents at a pre-trial hearing. The corporation argued that the order to produce was "so unlimited, so arbitrary and unjust as to cause it to be wanting in due process" (212 U. S. at 346). The Court ruled that all the statute required was a *bona fide* effort to comply with an order made pursuant to its provisions, and therefore "* * * any reasonable showing of an inability to

(ii) *The Literary Association's response.*—The Literary Association's statement of September 23, 1953 (L. R. 30–31), although verified, was also wholly deficient as either an answer or a challenge. Far from objecting to the interrogatories with that specificity necessary to permit the Attorney General to pass upon the objections, the statement makes no mention whatever of the interrogatories. It is no more than an argumentative pronouncement that the organization engages in innocuous pursuits and that the entire procedure is unconstitutional, ending with the abrupt declaration that "[t]he proceedings should be dismissed" (L. R. 31). This total rejection of further administrative proceedings, like that of the Workers Association, was emphasized by the Literary Association's failure to request a hearing.

3. While holding that the basic authority of the Attorney General to designate subversive organizations was not properly before it, the Court of Appeals stated that in any event it would uphold the validity of the power of designation (Pet. 11a). Petitioner strongly asserts error in this ruling (Pet. 29–33). We agree with the court below, for the reasons stated above, that that issue is not properly in this case and

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comply would have satisfied the requirements both of the statute and the order. As the Hammond Company absolutely declined to obey the order and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect." 212 U. S. at 347.

need not be reached, but we also agree that the power exists.

As we read *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, in the light of and together with *Adler* v. *Board of Education*, 342 U. S. 485, and *Wieman* v. *Updegraff*, 344 U. S. 183, this Court has already indicated that the substantive power of the Attorney General to designate organizations pursuant to the mandate of Executive Orders 9835 and 10450 is valid under the Constitution. In the *Joint Anti-Fascist* case, the organizations involved advanced contentions identical to those put forth by petitioners here (Pet. 2–3): (a) that no designation power may validly exist, and (b) that if it does, there are restrictions on the method of its exercise which have allegedly been violated. See Brief for Petitioner, No. 8, O. T. 1950, p. 48. In deciding that case, only one of the majority Justices agreed that the listings were invalid for total lack of power in the President and the Attorney General (341 U. S. at 142, 143); three other members of the majority implicitly rejected this basic contention by accepting the secondary contention that the designations were invalid for want of notice and hearing (341 U. S. at 149, 174, 183); the three dissenting Justices flatly rejected the basic contention (341 U. S. at 187).* Less than a year later, the Court

*This was the reading given the *Joint Anti-Fascist* case by the court below in its decision in *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552, 556 (C. A. D. C.), certiorari denied, 351 U. S. 927. The court there noted (225 F. 2d at 556):

"When the *Joint Anti-Fascist* case was before this court we had held flatly that the Executive Order was valid and that it authorized the listing. If the Supreme Court had been of opin-

handed down its decision in the *Adler* case, *supra*, upholding the constitutionality of a state law requiring the New York state board of regents, *inter alia*, to "* * * make a listing of organizations which it finds to be subversive * * *" (342 U. S. at 488). And in *Wieman* v. *Updegraff*, *supra*, involving a state statute establishing a loyalty oath which required state officers and employees to swear that they were not members of any organization determined by the Attorney General of the United States to be a Communist front or subversive organization, the Court assumed the general validity of the Attorney General's power to designate but struck down the particular oath for lack of a *scienter* requirement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

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ion that the Attorney General has no power whatever to designate organizations under the Executive Order, it seems to us the issue of a factual basis for a listing would have been immaterial and that the Court would necessarily have said so. Instead it remanded for such a factual determination."

APPENDIX

1. Section 9A of the Hatch Act (53 Stat. 1148, formerly 5 U. S. C. 118j), repealed but essentially reenacted as Section 118p of Title 5 by Act of August 9, 1955, Sections 1 and 4 (2), 69 Stat. 624–625), provided as follows in pertinent part:

> (1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

2. Public Law 733, 81st Congress (Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1, *et seq.*), provides as follows in pertinent part:

> AN ACT To protect the national security of the United States by permitting the summary suspension of employment of civilian officers and employees of various departments and agencies of the Government, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended

(5 U. S. C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services * * *.

3. Part III, Paragraph 3 of Executive Order 9835 of March 21, 1947 (12 F. R. 1938) provides as follows:

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

4. Executive Order 10450, effective May 27, 1953 (18 F. R. 2489), provides as follows in pertinent part:

> WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and
>
> WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:
>
> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:
>
> * * * * *
>
> SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his

department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * * * *

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security in accordance with the said act of August 26, 1950.

* * * * *

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

* * * * *

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force

or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

* * * * *

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

* * * * *

SEC. 15. This order shall become effective thirty days after the date hereof.

5. The Attorney General's Rules of Procedure for the federal employee security program (Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 CFR, 1956 Supp., Part 41) provide as follows:

DESIGNATION OF ORGANIZATIONS IN CONNECTION WITH THE FEDERAL EMPLOYEE SECURITY PROGRAM

By virtue of the authority vested in the Attorney General by section 22 of Title 5 of the United States Code, and by Executive Order No. 9835 of March 21, 1947, and Executive Order No. 10450 of April 27, 1953, I hereby prescribe the following rules of procedure with

respect to notice, hearing, and designation of organizations in connection with the Federal employee security program:

Sec.

41.1 Notice to and by organizations
41.2 Statement and interrogatories by Attorney General
41.3 Reply by organization
41.4 Request for hearing
41.5 Notice of hearing
41.6 Default
41.7 Hearing board or officer
41.8 Hearing
41.9 Recording of testimony
41.10 Determination
41.11 Previous designations not affected

AUTHORITY: §§ 41.1 to 41.11 issued under R. S. 161; 5 U. S. C. 22, E. O. 9835, Mar. 21, 1947, 12 F. R. 1935; 3 CFR, 1947 Supp.; E. O. 10450, Apr. 27, 1953, [18] F. R. 2489 [3 CFR, 1953 Supp.].

SECTION 41.1 *Notice to and by organizations.*—(a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization pursuant to Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by registered mail to such organization at its last known address. If the registered notice is delivered, the organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450,

whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the FEDERAL REGISTER, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the FEDERAL REGISTER, such organization may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the FEDERAL REGISTER.

(c) The notice of contest provided in this part shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

SECTION 41.2 *Statement and interrogatories by Attorney General.*—Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

SECTION 41.3 *Reply by organization.*—The organization, within sixty days following receipt of such statement and interrogatories,

may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

SECTION 41.4 *Request for hearing.*—Any organization filing a reply as provided in this part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

SECTION 41.5 *Notice of hearing.*—Upon receipt of a request as provided in Section 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

SECTION 41.6 *Default.*—When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

SECTION 41.7 *Hearing board or officer.*—For the purpose of conducting any hearing as provided in this part the Attorney General shall

assign such officer or board as he shall deem necessary.

SECTION 41.8 *Hearing.*—(a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this part it appears to the board or hearing officer that a determination may appropriately be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may be received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the

board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

SECTION 41.9 *Recording of testimony.*—The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made a part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

SECTION 41.10 *Determination.*—Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, replies to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In

making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosure to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

SECTION 41.11 *Previous designations not affected.*—The promulgation of the rules of procedure contained in this part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

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